IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.770 OF 2004

Shri Amrut Shamrao Desai .. Appellant

Versus

Smt. Kamal Shamrao Desai & Ors. .. Respondents

Shri R.V.More for appellant

Shri A.Y.Sakhare for respondents

CORAM : P.V.KAKADE,J.

DATE : 7th DECEMBER, 2004

P.C.:

1. The appellant-defendant no.1 has preferred this appeal against the judgment and order dated 5.2.2004 passed by Addl. District Judge, Sangli dismissing his appeal and confirming the Order passed by Joint Civil Judge, Senior Division, Sangli on 7.2.2001 decreeing the

suit of the plaintiffs against the defendant to deliver the possession of the suit property described in para 1-C of the plaint.

2. I heard the learned counsel for both the parties. Perused the record made available to me by both sides.

. The appellant - defendant no.1 along with Respondent NO.2 to 5 are children of deceased Shamrao, Respondent no.1 is widow of deceased Shamrao. According to the plaintiffs, Shamrao during his life time constructed a bungalow situated at Sangli in Overseer Colony bearing C.T.S. No.499 admeasuring 243.9 sq.mtrs. The said property is a three storied building in all including cellar and its name is "Shamal" bungalow. There are in all five rooms on the first floor of the said property and the three rooms on the next floor. The three rooms out of five rooms of the on the floor next to the cellar together with eastern side latrine and bath room is the property in dispute which is said to be in possession of the present appellant, of which possession was sought by the plaintiff by filing the suit.

. According to the plaintiffs, deceased Shamrao was working as Overseer and retired as Deputy Engineer in the year 1980. He purchased the suit plot for Rs.900/=. He constructed a bungalow and his family members, who are parties to the suit are residing therein. Shamrao died on 12.9.1996. The said Desai family are having their ancestral properties at village Gargoti but they did not get any income out of the said property and other brother had filed suit for partitions and separate possession of the ancestral properties. According to the plaintiffs, after marriage the appellant Amrut could not maintain the cordial relations with his father. On 26.4.1995 deceased Shamrao executed a Will and bequeathed the suit property in favour of the respondents, excluding appellant herein, who was the son. Hence the suit filed by remaining family members against the appellant for possession of the rooms occupied by him.

3. The appellant-defendant no.1 resisted the suit taking stand that the plot was purchased and a bungalow was constructed on it and therefore he had shared in the property and it was not self acquired of his father Shamrao. Appellant also contended that the Will of

Shamrao was surrounded by suspicious circumstances and therefore, Will which was executed by Shamrao was challenged. On such and other grounds the appellant sought dismissal of the suit.

4. The learned trial judge adjudicated the dispute on merits and came to the conclusion that the plaintiffs had proved their case to the effect that the suit property was self acquired property of father Shamrao and his Will bequeathed all the property to the present respondent was genuine and as such the suit came to be decreed against the appellant-defenadnt no.1. The appeal was preferred by the appellant to the District Court, Sangli. The Addl. District Judge, Sangli after hearing both the parties endorsed to the findings recorded by the trial judge and dismissed the appeal. Hence the present appeal.

5. At the outset it may be noted that it was strenuously urged on behalf of the appellant that Desai family had an ancestral joint family property and out of that income deceased Shamrao had purchased the said property, whereas the respondent had come with a categorical case that Shamrao had acquired the property

from his own income and no nucleus was available for Shamrao from joint family property to purchase the suit property.

. The learned counsel for the appellant took me through the judgment as well as relevant evidence on record in order to show that nucleus from joint family property was available for Shamrao to purchase the suit property. However, perusal of the evidence shows that the property was purchased by Shamrao in the year 1964 when Shamrao was already in service for more than 17 years. When he purchased the open plot deceased Shamrao was getting salary of Rs.300/= per month. The bungalow was constructed subsequently. His widow Kamal has deposed in her evidence that for raising funds her husband took loans from the society, banks, life insurance corporation and also Patharwat contractor. This fact is also admitted by the appellant in his cross examination that Shamrao had taken loan from his provident fund and insurance policy also. Moreover, though the appellant’s case is that Shamrao had used nucleus from joint family property to purchase the suit property, still there is no iota of any evidence on record to show that such nucleus was available, though

admittedly, joint family property was in existence, which was in possession of another real brother of Shamrao. In my view, mere availability of joint family property would not be sufficient to presume availability of nucleus out of such property, which aspect has not been established by the appellant during the course of trial and therefore, I have no hesitation to hold that the appellant has failed to establish the issue of nucleus from joint family property, as alleged. The reasoning adopted and findings recorded by both the courts below appears to be just and proper.

6. Similar is the case with regard to the allegation regarding Will of Shamrao. Evidence on record does not warrant any interference to the effect that the Will of Shamrao is surrounded by suspicious circumstances only because appellant was excluded from getting any benefits by Shamrao. It has come on record that after appellant's marriage he was not having cordial relation with Shamrao and other family members and as such it was obvious that Shamrao chose to exclude the appellant from the list of beneficiaries while making the Will.

7. Therefore, I have no doubt whatsoever that both the

courts below have correctly appreciated the entire evidence on record as laid down by the apex court in the case of **KONDIBA DAGADU KADAM VS. SAVITRIBAI SOPAN GUJAR & ORS. AIR 1999 (3) SUPREME COURT 2213**, the conditions mentioned in the Section 100 of C.P.C. must be strictly fulfilled before a second appeal can be maintained and no Court has the power to add to or enlarge those grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under section 100 of C.P.C. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. In the present case before us, as can be seen from the record, both the courts below have appreciated the evidence in just, legal and proper manner and therefore, it would brook no interference. Hence the appeal stands dismissed in limine. Consequently the civil application also stands dismissed with no order as to costs.

8. While concluding his argument, the learned counsel for the appellant prayed for some time to vacate the suit premises as per the decree of the Lower Court. It

was pointed out by the learned counsel for the respondent that the Lower Court had granted stay on condition that the appellant should deposit Rs.40,000/= in the court within 15 days from the date of the order of the lower appellate court and was further directed to deposit Rs.1000/= per month on or before 10th day of each month. It was submitted that the appellant has depositing the amount as per direction of the Lower Court. In view of this aspect, it is hereby directed that the decree shall not be executed for the period of three months from the date of this order. If the appellant has deposited the initial deposit of Rs.40,000/=, as directed by the Lower Appellate Court, appellant is further directed to clear the arrears, if any, of payment of Rs.1000/= per month on or before 10th day of each month of the period pending this appeal and till completion of period of three months from the date of this order.

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